

No. 12884.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL FRUIT & VEGETABLE Co., and WEST TEXAS
PRODUCE COMPANY,

Appellants,

vs.

ASSOCIATED FRUIT DISTRIBUTORS OF CALIFORNIA, RAY-
MOND M. CRANE, RED LYON PACKING COMPANY, and
JOHN C. KAZANJIAN,

Appellees.

PETITION FOR REHEARING.

HARRY A. PINES,
ADELE WALSH,
417 South Hill Street,
Los Angeles 13, California,

J. MANUEL HOPPENSTEIN,
Southwestern Life Building,
Dallas 1, Texas,

Attorneys for Appellants.

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Appellees.

PETITION FOR REHEARING.

*To the Honorable Judges of the United States Court of
Appeals for the Ninth Circuit:*

Although the decision of this Court, filed February 27, 1952, vacates the judgment of the District Court from which this appeal was taken, we believe that our responsibility as officers of the court compels us to direct attention to probable error in the reason assigned by the Court for its decision.

The opinion of the Court is based upon the conclusion that the order of Thomas J. Flavin, Judicial Officer for the Secretary of Agriculture, was not an appealable order. The Court conceded that if the order had been made by the Secretary of Agriculture, it would have been appealable to the District Court.

The opinion of the Court overlooks the existence of the *Act of April 4, 1940*, c. 75, Sections 1 to 3, inclusive, 54 Stat. 81, 5 U. S. C. A. 516a-516c,* which vests the Secretary of Agriculture with authority to delegate his regulatory functions to any officer designated by said Act. The Act includes within regulatory functions of the Secretary the issuance or promulgation of regulatory orders, which by definition of the statute, embraces awards such as the award of reparation damages in the instant case.

Pursuant to the authority vested in him by the *Act of April 4, 1940*, the Honorable Clinton P. Anderson, as Secretary of Agriculture, on November 7, 1945, made an order designating Thomas J. Flavin, Assistant to the Secretary, as Judicial Officer, with authority to perform any regulatory function defined in the *Act of April 4, 1940*. This delegation of authority was published in the Federal Register on November 9, 1945, and appears in *Volume 10, Federal Register*, page 13769.*

The Federal Register Act requires that judicial notice be taken of the contents of the Federal Register, 44 U. S. C. A. 307.*

The courts of appeal have judicially noticed the contents of the Federal Register.

Kempe v. United States (8th Cir.), 151 F. 2d 680;
Green v. United States (1st Cir.), 176 F. 2d 541;
United States ex rel. Brown v. Lederer (7th Circuit), 140 F. 2d 136.

In the case of *Kiyoichi Fujikawa, et al. v. Sunrise Soda Water Works Co., et al.*, 158 F. 2d 490 at page 493, this

*See appendix hereto for pertinent text.

Court recognized that it may take judicial notice of executive orders which are published in the Federal Register.

Had the question of the authority of Thomas J. Flavin been raised by appellees as an issue of this case, we would have included in our briefs the basis for such authority. The Court may recall that at the oral argument, when the question of Mr. Flavin's authority was raised *sua sponte* by Circuit Judge Mathews, counsel for appellees unequivocally conceded the authority of the Judicial Officer. We regret that we did not anticipate that such question might be posed, thus possibly enabling us to assist in averting what we respectfully believe to be error in the Court's opinion.

Although the effect of the opinion vacating the decision of the District Court is not such as to constitute us as aggrieved thereby, we believe that it should be set aside to avoid creating doubt as to the validity of numerous orders that have been signed by the Judicial Officer of the Secretary of Agriculture.

Wherefore, petitioner respectfully prays that a rehearing be granted, and that thereupon, the judgment of the District Court be reversed with directions to enter judgment for appellants, and for such further relief as this Court may deem proper.

Respectfully submitted,

HARRY A. PINES,
ADELE WALSH, and
J. MANUEL HOPPENSTEIN,

By HARRY A. PINES,

Attorneys for Appellants.

Certification.

I, Harry A. Pines, an attorney regularly admitted to practice in the United States Court of Appeals for the Ninth Circuit, do certify that in my opinion, the foregoing petition for rehearing in the case of Central Fruit & Vegetable Co., *et al.*, appellants, vs. Associated Fruit Distributors of California, *et al.*, appellees, is well founded and that it is not presented for the purpose of creating delay.

HARRY A. PINES.

APPENDIX.

Title 5, U. S. C. A.:

Section 516a. Delegation of regulatory functions of Secretary of Agriculture: definitions.

As used in sections 516a-516e of this title—

(a) The term “regulatory order” means an order, marketing agreement, standard, permit, license, registration, suspension or revocation of a permit, license, or registration, certificate, award, rule, or regulation, if it has the force and effect of law, and if it may be made, prescribed, issued, or promulgated only after notice and hearing or opportunity for hearing have been given.

(b) The term “regulatory function” means the making, prescribing, issuing, or promulgating, of a regulatory order; and includes (1) determining whether such making, prescribing, issuing, or promulgating is authorized or required by law, and (2) any action which is required or authorized to be performed before, after, or in connection with, such determining, making, prescribing, issuing, or promulgating. Apr. 4, 1940, c. 75, Section 1, 54 Stat. 81.

Section 516b. Delegation of regulatory functions to designated employees; status of employees; number; revocation of delegation.

Whenever the Secretary of Agriculture deems that the delegation of the whole or any part of any regulatory function which the Secretary is, now or hereafter, required or authorized to perform will result in the more expeditious discharge of the duties of the Department of Agriculture, he is authorized to make such delegation to any officer or employee designated under this section. The Secretary is

authorized to designate officers or employees of the Department to whom functions may be delegated under this section, and to assign appropriate titles to such officers or employees. The position held by any officer or employee while he is designated under this section, and vested with a regulatory function or part thereof delegated under this section, shall be allocated to a grade, not lower than grade 7, in the professional and scientific service provided for by sections 661-663, 664-669, 670-672, 673 and 674 of this title, or to a grade, not lower than grade 14, in the clerical, administrative, and fiscal service provided for by such sections. There shall not be in the Department at any one time more than two officers or employees designated under this section and vested with a regulatory function or part thereof delegated under this section. The Secretary may at any time revoke the whole or any part of a delegation or designation made by him under this section. Apr. 4, 1940, c. 75, Sec. 2, 54 Stat. 81.

Section 516c. Authority of designated employees; retroactive revocation of delegation

Whenever a delegation is made under section 516b of this title, all provisions of law shall be construed as if the regulatory function or the part thereof delegated had (to the extent of the delegation) been vested by law in the individual to whom the delegation is made, instead of in the Secretary of Agriculture. A revocation of delegation shall not be retroactive, and each regulatory function or part thereof performed (within the scope of the delegation) by such individual prior to the revocation shall be considered as having been performed by the Secretary. Apr. 4, 1940, c. 75, Section 3, 54 Stat. 82.

Title 44, U. S. C. A.:

Section 307.

* * * The publication in the Federal Register of any document shall create a rebuttable presumption (a) that it was duly issued, prescribed, or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original; and, (d) that all requirements of this chapter and the regulations prescribed hereunder relative to such document have been complied with. The contents of the Federal Register shall be judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number. (July 26, 1935, c. 417, Section 7, 49 Stat. 502.)

10 Federal Register, page 13769:

1. Pursuant to the provisions of the act approved April 4, 1940 (54 Stat. 81; 5 U. S. C. 516a-516e), Thomas J. Flavin, Assistant to the Secretary, is designated as Judicial Officer and is authorized to perform any regulatory function as defined in the said act of April 4, 1940, which the Secretary of Agriculture is or hereafter may be authorized or required by law to perform.

2. The provisions of this order shall not affect the authority of the Secretary of Agriculture to perform any regulatory function, and shall not affect the authority of the Under Secretary or of the Assistant Secretary of Agriculture, by virtue of any delegation of authority heretofore or hereafter made, to perform such function.

3. The provisions of this order shall not be construed to limit the authority of Thomas J. Flavin to perform any functions, in addition to those defined in said act of April 4, 1940, which from time to time may be assigned by the Secretary to him.

4. The orders issued on April 3, 1942 (7 F. R. 2656) and June 12, 1943 (8 F. R. 8087), delegating to the said Thomas J. Flavin authority to perform regulatory functions are hereby revoked.

Done at Washington, D. C., this 7th day of November, 1945.

CLINTON P. ANDERSON,
Secretary of Agriculture.

(SEAL)

(F. R. Doc. 45-20493; Filed Nov. 8, 1945; 11:14 A.M.)